SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 408

PAN-ATLANTIC STEAMSHIP CORPORATION,
APPELLANT,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 424

INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

INDEX

	Original	Print
Record from U.S.D.C., District of Massachusetts	1	1
Designation of three-judge District Court	1	1
Plaintiff's motion for leave to file a first amended complaint	2	2
First amended complaint	4	3
Exhibit 12—Order of the I.C.C. of May 18, 1955	13	9
Exhibit 15—Notice to the Public by the I.C.C. dated September 30, 1955	14	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JAN. 16, 1957

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	Original	Print
Record from U.S.D.C., District of Massachusetts—Continued		
First amended complaint—Continued		
Exhibits—Continued		
Exhibit 16—Reply filed before the I.C.C. by The Atlantic Coastline Railroad Co., et al., to request by applicant for extension of temporary authority	15	12
Exhibit 17—Order of the I.C.C. of October 28, 1955	18	14
Exhibit 18—Petition filed before the I.C.C. by The Atlantic Coastline Railroad Co., et al., for reconsideration of the Commission's order of October 28, 1955 continuing temporary authority	19	15
Exhibit 19—Order of the I.C.C. of January 9, 1956	23	18
Motion of Interstate Commerce Commission for leave to intervene	24	19
Motion of Pan-Atlantic Steamship Corporation for leave to intervene	25	19
Order allowing intervention of Pan-Atlantic Steamship Corporation	26	20
Answer of Interstate Commerce Commission to the Plaintiffs' first amended complaint	27	21
First amended answer of intervening defendant, Pan-Atlantic Steamship Corporation	33	24
Plaintiff's motion for summary judgment	37	27
Motion of intervening defendant, Pan-Atlantic Steamship Corporation, for summary judgment	40	28
Opinion, Per curiam	42	30
Concurring opinion, Wyzanski, J.	44	31
Judgment	45	32
Petition of the Interstate Commerce Commission for stay of judgment	47	33
Order granting stay of judgment pending appeal to and final disposition of appeal by the Supreme Court	52	36
Notice of appeal by the Interstate Commerce Commission	54	37
Notice of appeal by The Pan-Atlantic Steamship Corporation	58	39
Amendment to designation of record to be certified	61	41
Amendment to notice of appeal by the Interstate Commerce Commission	63	42
Clerk's certificate (omitted in printing)	65	
Orders noting probable jurisdiction	66	43

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

Civil Action No. 56-232-W

THE ATLANTIC COAST LINE RAILROAD COMPANY, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant

DESIGNATION OF THREE-JUDGE DISTRICT COURT—March 19, 1956

Pursuant to the authority and command of 28 U. S. C. § 2284, I hereby designate and assign Hon. Calvert Magruder, U. S. Circuit Judge for the First Circuit, and Hon. Francis J. W. Ford, U. S. District Judge for the District of Massachusetts, to sit with the Hon. Charles E. Wyzanski, Jr., U. S. District Judge for the District of Massachusetts, in the above-entitled cause, a three-judge district court being required by 28, U. S. C. § 2325.

(S.) Calvert Magruder, Chief Judge, First Circuit.

March 19, 1956.

[File endorsement omitted.]

[fol. 2] In United States District Court, District of Massachusetts

Civil Action No. 56-232-W

Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, Plaintiffs,

vs.

The United States of America, Defendant,

And The Interstate Commerce Commission of the United States and Pan-Atlantic Steamship Corporation, Intervening Defendants.

Plaintiffs' Motion for Leave to File a First Amended Complaint—April 30, 1956

The plaintiffs in the above-docketed action move for leave to file their first amended complaint, attached hereto in conformity with the undertaking they made before Judge Wyzanski at a pre-trial conference held April 27, 1956.

Respectfully submitted, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, by their attorneys, W. Q. Keenan, 54 Meadow Street, New Haven 6, Conn., E. M. Sweeney, South Station, Boston, Massachusetts.

New Haven, Connecticut

April 30, 1956

[fol. 3] Of counsel:

Charles T. Abeles, James A. Bistline, Prime F. Osborn, III, Carl Helmetag, Jr., U. B. Ellis, Anthony P. Donadio.

Copies sent on [illegible]

[fol. 4] In United States District Court, District of Massachusetts

[Title omitted]

First Amended Complaint

1. This action arises under 49 U. S. C. A. §§ 911 (a), 916 (a), and 17 (9) and 28 U. S. C. A. §§ 1336 and 2321 through 2325, as hereinafter more fully appears. Therefore this court has jurisdiction because this is a civil action to set aside and annul an order of the Interstate Commerce Commission of the United States (hereinafter sometimes called the Commission).

2. The plaintiffs are railroad corporations organized and existing under the laws of various States of the United States, and are common carriers of freight and passengers in interstate commerce, among others, in the States of [fol. 5] Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Delaware, Maryland, West Virginia, Kentucky, Virginia, District of Columbia, North Carolina, Tennessee, South Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana.

3. An important and significant segment of the transportation operations conducted by the plaintiffs is the transcontinental movement of freight and passengers between the eastern and western portions of the United States, in conjunction with other railroad companies whose lines connect with those of the plaintiffs and extend to the West Coast of the United States. Said transcontinental transportation operations include participation by the plaintiffs in transcontinental movements of freight and passengers from Philadelphia, Pennsylvania; Baltimore, Maryland; Charleston, South Carolina; Jacksonville and Miami, Florida to Seattle, Washington; Portland, Oregon; and San Francisco, Oakland, Alameda and Los Angeles Harbor, California; from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, California to Boston, Massachusetts; New York Harbor, New York; Philadelphia, Pennsylvania; Baltimore, Maryland; Norfolk, Virginia; Charleston, South Carolina; and Jacksonville and

Miami, Florida; and from Seattle, Washington and Portland, Oregon to Philadelphia, Pennsylvania; Baltimore, Maryland; Norfolk, Virginia; Charleston, South Carolina and Jacksonville and Miami, Florida. Said transcontinental transportation also includes the movement of freight and passengers between and among the inland areas served by the ports above listed, corresponding to the operations above described between and among these ports.

4. Among the plaintiffs, The New York, New Haven and Hartford Railroad Company is a corporation organized and existing under the laws of Massachusetts and a resident of the Commonwealth of Massachusetts with a place [fol. 6] of business at South Station, Boston, Massachusetts.

5. Pan-Atlantic Steamship Corporation (hereinafter sometimes called Pan Atlantic) is a corporation organized and existing under the laws of the State of Delaware with a place of business at 61 St. Joseph Street, Mobile, Alabama. It is a common carrier of freight and passengers in interstate commerce between and among the following ports: Boston, Massachusetts; New York, New York; Philadelphia, Pennsylvania; Baltimore, Maryland; Georgetown and Charleston, South Carolina; Jacksonville, Miami, Tampa, Port St. Joe, Pensacola and Panama City, Florida; Mobile, Alabama; New Orleans, Louisiana and Houston and Galveston, Texas; in addition Pan Atlantic operates as a carrier intercoastally as hereinafter more fully appears.

6. On or about May 5, 1955 Pan Atlantic filed with the Commission an application for permanent authority to transport freight as a common carrier between the following Pacific and Atlantic ports:

Pacific Coast Ports

Alameda, Calif.	Everett, Wash.
Anacortes, Wash.	Grays Harbor, Wash.
Astoria, Oreg.	Kalama, Wash.
Bellingham, Wash.	Long Beach, Calif.
Bradwood, Oreg.	Longview, Wash.
Bremerton, Wash.	Los Angeles Harbor, Calif.
Empire, Oreg.	Mare Island, Calif.

Pacific Coast Ports

Marshfield, Oreg.
North Bend, Oreg.
Oakland, Calif.
Olympia, Wash.
Portland, Oreg.
Port Angeles, Wash.
Port Townsend, Wash.
Prescott, Oreg.
Rainier, Oreg.
Richmond, Calif.
St. Helens, Oreg.
San Diego, Calif.
San Francisco, Calif.
Seattle, Wash.
Stockton, Calif.
Tacoma, Wash.
Vancouver, Wash.
Warrenton, Oreg.
Wauna, Oreg.
Westport, Oreg.
Willapa Harbor, Wash.
Yaquina Bay, Oreg.

Atlantic Coast Ports

Albany, N. Y.
Baltimore, Md.
Bayonne, N. J.
Bayway, N. J.
Boston, Mass.
Bridgeport, Conn.
Brooklyn, N. Y.
Brunswick, Ga.
Camden, N. J.
Chester, Pa.
Charleston, S. C.
Georgetown, S. C.
Hoboken, N. J.
Irvington, N. Y.
Jacksonville, Fla.
Jersey City, N. J.
Marcus Hook, Pa.
New London, Conn.
Newport News, Va.
New York, N. Y.
Norfolk, Va.
Paulsboro, N. J.
Philadelphia, Pa.
Port Everglades, Fla.
Portland, Maine
Port Newark, N. J.
Portsmouth, R. I.
Poughkeepsie, N. Y.
Providence, R. I.
Savannah, Ga.
Wilmington, Del.
Wilmington, N. C.

[fol. 7] 7. Said application referred to above in paragraph 6 also requested permanent authority to transport passengers as a common carrier between the Atlantic and Pacific ports above named, both coastwise and intercoastally, except between Baltimore, Maryland and Norfolk and Newport News, Virginia; and in addition between the Pacific Coast ports above named on the one hand, and on the other, Galveston and Houston, Texas; New Orleans, Louisiana; Mobile, Alabama; Panama City, Florida; and Tampa, Florida.

8. On or about May 18, 1955 the Commission granted to Pan Atlantic authority to operate as a common carrier by self-propelled vessels in interstate or foreign commerce in the transportation of passengers and commodities between the same ports and in the same directions as those set forth in paragraph 3 hereinabove, by an order which continued in force to and including November 14, 1955 unless sooner modified by the Commission. A copy of this order is appended to the complaint herein and marked exhibit 12.

9. On or about September 30, 1955 Pan Atlantic requested the Commission to extend beyond 180 days the temporary authority granted by the Commission's order of May 18, 1955, exhibit 12, referred to in paragraph 8 hereinabove. A copy of the Commission's notice of said petition is appended to the complaint herein and marked exhibit 15.

10. On or about October 13, 1955 the plaintiffs replied to said petition, exhibit 15, referred to in paragraph 9 hereinabove, and a copy of said reply is appended to the complaint herein and marked exhibit 16.

11. The petition for reconsideration referred to in paragraph 2 of exhibit 16 is appended to the complaint herein and marked exhibit 13.

[fol. 8] 12. On or about October 28, 1955 the Commission granted said petition for extension of temporary authority, exhibit 15, referred to in paragraph 9 hereinabove, by an order which authorized Pan Atlantic to continue to perform services under the temporary authority until further order of the Commission, but not beyond the time Pan Atlantic's application for permanent authority referred to in paragraphs 6 and 7 hereinabove shall have been finally determined. A copy of said order is appended to the complaint herein and marked exhibit 17.

13. On or about November 23, 1955 the plaintiffs filed a petition for reconsideration of the Commission's said order of October 28, 1955, exhibit 17, referred to in paragraph 12 hereinabove. A copy of said petition is appended to the complaint herein and marked exhibit 18.

14. On or about January 9, 1956 the Commission denied said petition for reconsideration (exhibit 18) and a copy

of said order of denial is appended to the complaint herein and marked exhibit 19.

15. The Commission's order of May 18, 1955 granting temporary authority to Pan Atlantic, exhibit 12, and the Commission's order of October 28, 1955 authorizing Pan Atlantic to continue to perform the watercarrier service previously authorized by said temporary authority, exhibit 17, together constitute a grant of temporary authority which has been, is and will be valid for more than an aggregate of 180 days.

16. A grant by the Commission of temporary authority valid for more than an aggregate of 180 days is contrary to the provisions of section 311 (a) of the Interstate Commerce Act, 49 U. S. C. A. 911 (a) and is therefore unlawful, arbitrary and capricious.

[fol. 9] 17. Pursuant to the provisions of said final order of the Commission, Pan Atlantic has engaged in operations in interstate traffic which are commercially competitive with some of those of the plaintiffs set forth above in paragraph 3.

18. The exact amount of the damages thus suffered by the plaintiffs is impossible to compute nor is the loss of business and good will suffered by the plaintiffs in the past and threatened the plaintiffs in the future by a continuation of said operations by Pan Atlantic compensable in damages. Revenues which could have been and could be earned by the plaintiffs from patrons who have made use or who continue to use the services of Pan Atlantic described above while Pan Atlantic remains the beneficiary of the temporary authority described above have been and will be irrevocably lost and the investment of the plaintiffs in transportation facilities and equipment has been and will be rendered thereby partially unproductive.

19. Neither the Commission nor Pan Atlantic is responsible in damages to the plaintiffs for losses thus sustained in the past and to be sustained in the future; consequently the plaintiffs have no adequate remedy at law.

20. The plaintiffs are informed and believe that unless this honorable court vacates and annuls the Commission's said final order of October 28, 1955 (exhibit 17) said order will remain in effect until the determination of Pan At-

lantic's application for permanent intercoastal authority referred to in paragraph 11 (b) of the complaint herein.

21. Said application has required and will require hearings by a Commission examiner in several cities of the United States, in the course of which, so the plaintiffs are [fol. 10] informed and believe, the testimony of more than 100 witnesses will be taken.

22. The plaintiffs are informed and believe that this administrative process will not culminate in a final order for many months and possibly several years. If review in the courts is sought after such final order by the Commission, said proceeding concerning the permanent authority sought by Pan Atlantic will remain pending until such proceedings in the courts are terminated. In the meantime, the plaintiffs will continue to suffer immediate and irreparable damage through the competition of Pan Atlantic as set forth above.

23. The exhibits referred to hereinabove were uttered, dispatched and received in due course of business and in accordance with their tenor.

Wherefore, plaintiffs pray:

A. That a court constituted as required by 28 U. S. C. A. § 2284 be convened and that process issue against the Commission as provided by law.

B. That in the exercise of the power granted it by 49 U. S. C. A. § 17(9) and 28 U. S. C. A. § 1336 said court set aside the Commission's said order of October 28, 1955 (exhibit 17).

C. That said court enter a permanent injunction requiring the Commission to order the termination of the temporary operations conducted by Pan Atlantic under the temporary authority granted by the Commission's orders of May 18, 1955 (exhibit 12), and October 28, 1955 (exhibit [fol. 11] 17).

D. That plaintiffs have such further relief as is justified.

Respectfully submitted, Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Sea-

board Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, by their attorneys, W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut, E. M. Sweeney, South Station, Boston, Massachusetts.

New Haven, Connecticut

April 30, 1956

Of counsel:

Charles T. Abeles, James A. Bistline, Prime F. Osborn, III, Carl Helmetag, Jr., U. B. Ellis, Anthony P. Donadio.

Duly sworn to by W. Q. Keenan. Jurat omitted in printing.

[fol. 13] EXHIBIT No. 12 TO FIRST AMENDED COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of May, A. D. 1955.

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

Pan-Atlantic Steamship Corporation having made application under the provisions of section 311(a) of the Interstate Commerce Act for temporary authority to operate as a carrier by water, in interstate or foreign commerce, and having shown that there is an immediate and urgent need

for the service specified below and that there is no other carrier service capable of meeting such need: and the division so finding, therefore:

It is ordered, That applicant be, and it is hereby, authorized to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It is further ordered, That in the exercise of the authority specified above, said carrier shall comply with all applicable requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

And it is further ordered, That this order shall continue in force to and including November 14, 1955, unless sooner suspended, modified, or set aside by further order of the Commission.

By the Commission, division 4.

[Seal] Harold D. McCoy, Secretary.

[fol. 14] EXHIBIT NO. 15 TO FIRST AMENDED COMPLAINT

INTERSTATE COMMERCE COMMISSION

September 30, 1955

Docket No. W-376 (Sub-No. 11)

Notice to the Public

Docket No. W-376 (Sub-No. 12)

Request for extension of Temporary Authority

Filed September 30, 1955. By Pan-Atlantic Steamship Corporation, Waterman Building, 81 St. Joseph St., Mobile, Ala.

Request that temporary authority granted by order of May 18, 1955, to operate as a common carrier by self propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, until November 14, 1955, be continued in effect until such time as the application for a certificate in W-376 (Sub-No. 13) has been determined.

Harold D. McCoy, Secretary.

[fol. 15] EXHIBIT NO. 16 TO FIRST AMENDED COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

REPLY OF THE ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIRLINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY TO THE REQUEST BY APPLICANT FOR EXTENSION OF TEMPORARY AUTHORITY

Come now the Atlantic Coast Line Railroad Company, the Baltimore & Ohio Railroad Company, Louisville & Nashville Railroad Company, The New York, New Haven and Hartford Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company and Southern Railway Company and file this, their reply in opposition to the applicant's request for extension of temporary authority, and assign as grounds, therefore, the following:

1. By order of May 18, 1955 the Commission has granted applicant certain intercoastal temporary authority [fol. 16] until November 14, 1955.
2. The protestant railroads above named oppose any extension of this grant for the same reasons as those set forth in their petition for reconsideration filed in this proceeding and dated June 2, 1955.
3. Section 311 (a) which is the sole source of the Commission's power to issue an order granting temporary authority such as the Commission's said order of

May 18, 1955, explicitly limits said power by providing that such temporary authority shall be valid for "not more than an aggregate of 180 days." An order of the Commission extending temporary authority responsive to the applicant's request beyond November 14, 1955, that is, for more than an aggregate of 180 days, would therefore be arbitrary, capricious and unlawful. *Stowe's Express* v. *United States*, 122 F. Supp. 955 (D. Mass., May 25, 1954).

Wherefore, the above-listed railroads respectfully pray that the Commission deny the applicant's request for extension of temporary authority granted it by the Commission's order of May 18, 1955.

Respectfully submitted, Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl [fol. 17] Helmetag, Jr., W. Q. Keenan, Prime F. Osborn, III., Attorneys for Protestants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the applicant and all persons with interests allied to the applicant by mailing by first-class mail 25 copies thereof to David G. Macdonald, Esq., Cafritz Building, 1625 K Street, N. W., Washington 6, D. C.

Dated at New Haven, Connecticut, this 13th day of October, 1955.

W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut.

[fol. 18] EXHIBIT NO. 17 TO FIRST AMENDED COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 28th day of October, A. D. 1955

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

It appearing, That by order of May 18, 1955, the Commission, division 4, granted Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jacksonville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor.

It further appearing, That there is a public need for continuance of the said water carrier service, that it is an activity of a continuing nature, and that this service corresponds in part with that which the carrier by application No. W-376 (Sub-No. 13) seeks a certificate of public convenience and necessity; and good cause appearing therefor:

It is ordered, That said carrier be, and it is hereby, authorized to continue to perform said water carrier service until further order of the Commission, but not beyond the time said application No. W-376 (Sub-No. 13) has been finally determined.

By the Commission, division 4.

[Seal] Harold D. McCoy, Secretary.

[fol. 19] EXHIBIT No. 18 TO FIRST AMENDED COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

PETITION BY THE ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE & OHIO RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY FOR RECONSIDERATION OF THE COMMISSION'S ORDER OF OCTOBER 28, 1955 CONTINUING TEMPORARY AUTHORITY.

Come now the railroads above named, protestants herein and file this, their petition for reconsideration of the Commission's order of October 28, 1955 extending beyond 180 days the temporary authority granted Pan-Atlantic Steamship Corporation by the Commission's order herein of May 18, 1955, and assign as their grounds therefore the following:

(1) Pursuant to application filed under the provisions of section 311(a) of the Inter-tate Commerce Act, the Com-

mission issued an order dated May 18, 1955 granting to Pan-Atlantic Steamship Corporation temporary authority to operate as a common carrier by self-propelled vessels, in interstate or foreign commerce, in the transportation (1) of passengers and commodities generally (a) from Philadelphia, Pa., Baltimore, Md., Charleston, S. C., Jackson-[fol. 20] ville and Miami, Fla., to Seattle, Wash., Portland, Oreg., San Francisco, Oakland, Alameda and Los Angeles Harbor, Calif., (b) from San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor to Boston, Mass., New York Harbor, N. Y., Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (c) from Seattle and Portland to Philadelphia, Baltimore, Norfolk, Charleston, Jacksonville and Miami, and (2) of passengers between New Orleans, La., and Houston, Tex., on the one hand, and, on the other, Seattle, Portland, San Francisco, Oakland, Alameda, Stockton and Los Angeles Harbor, beginning with the date of said order.

(2) The applicant herein has filed an application, pursuant to section 309 of the Interstate Commerce Act under Docket No. W-376 (Sub-No. 13) which seeks a certificate of public convenience and necessity corresponding in part with the grant of temporary authority made by the Commission's said order of May 18, 1955. The application in Docket No. W-376 (Sub-No. 13) is still pending.

(3) By order of the Commission, Division 4, dated October 28, 1955 Pan-Atlantic Steamship Corporation is authorized to continue to perform water carrier service under said grant of temporary authority until further order of the Commission, but not beyond the time said application W-376 (Sub-No. 13) has been finally determined.

[fol. 21] (4) Thus the Commission, by its said order of October 28, 1955, has attempted to make said grant of temporary authority, dated May 18, 1955 valid for more than an aggregate of 180 days.

(5) Section 311(a), which is the sole source of the Commission's power to issue an order granting temporary authority such as the Commission's said order of May 18, 1955, explicitly limits said power to the granting of only such temporary authority as "shall be valid for such time as the Commission shall specify but not for more than an aggregate of 180 days." An order of the Commission ex-

tending such a grant of temporary authority as was made by the Commission's said order herein of May 18, 1955 beyond a period of 180 days is therefore arbitrary, capricious, and unlawful, *Stone's Express vs. United States*, 122 F. Supp. 955 (D. Mass., May 25, 1954).

(6) The protestant railroads above named oppose any extension of this grant for the further reasons which are set forth in their petition for reconsideration filed in this proceeding and dated June 2, 1955, which the Commission is respectfully requested to incorporate in this pleading by reference thereto.

Wherefore, your petitioners respectfully pray that the Commission, pursuant to section 17(6) of the Interstate Commerce Act reconsider its said order of October 28, 1955 extending said grant of temporary authority, and that [fol. 22] pursuant to section 17(7) of the Interstate Commerce Act the Commission, upon such reconsideration find that particular order is unjust and unwarranted and therefore reverse said order by vacating it.

Respectfully submitted, Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl Helmetag, Jr., W. Q. Keenan, Prime F. Osborn, III, Attorneys for Protestants.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the applicant and all persons with interests allied to the applicant by mailing by first-class mail 25 copies thereof to David G. Macdonald, Esq., Cafritz Building, 1625 K Street, N. W., Washington 6, D. C.

Dated at New Haven, Connecticut, this 23rd day of November, 1955.

W. Q. Keenan, 54 Meadow Street, New Haven, Conn.

[fol. 23] EXHIBIT NO. 19 TO FIRST AMENDED COMPLAINT

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 9th day of January, A. D. 1956

No. W-376 (Sub-No. 11)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE

No. W-376 (Sub-No. 12)

PAN-ATLANTIC STEAMSHIP CORPORATION
TEMPORARY AUTHORITY—INTERCOASTAL TRADE (2)

Upon consideration of the record in the above-entitled proceedings, joint petition of The Atlantic Coast Line Railroad Company, The Baltimore & Ohio Railroad Company, Louisville & Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, and Southern Railway Company for reconsideration, and the reply thereto of applicant; and it appearing that the reasons set forth in support of said petition do not present good and sufficient cause to warrant granting of the petition:

It is ordered, That the said petition be, and it is hereby, denied.

By the Commission.

[Seal] Harold D. McCoy, Secretary.

[fol. 24] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION OF INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE—Filed April 16, 1956

Comes now the Interstate Commerce Commission and pursuant to Section 2323, Title 28, of the United States Code moves the Court for leave to intervene, as of right, as a party defendant in the above entitled cause, enters the appearance of its counsel herein, and files herewith a motion to strike certain matter from the Plaintiffs' complaint.

(S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel, Attorneys for the Interstate Commerce Commission, Washington 25, D. C.

[File endorsement omitted.]

[fol. 25] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

MOTION OF PAN-ATLANTIC STEAMSHIP CORPORATION FOR LEAVE TO INTERVENE—Filed April 13, 1956

Comes now Pan-Atlantic Steamship Corporation, a corporation organized and existing under the laws of the state of Delaware with general offices at Mobile, Alabama, the holder of the temporary operating authority issued by the Interstate Commerce Commission, the extension of which authority is the subject of the complaint in this proceeding, and respectfully moves the court for leave to intervene as a defendant in this action pursuant to Rule 24 of the Rules of Civil Procedure of the District courts of the United States and pursuant to the provisions of Sec. 2323, Title 28, U. S. Code.

Wherefore, Pan-Atlantic Steamship Corporation respectfully prays that it be permitted to intervene in this action as a party defendant and that it be granted leave to file the Motion to Strike and Answer to the Complaint as attached hereto, and such other pleadings as may be necessary in this matter.

Pan-Atlantic Steamship Corporation by its Attorney, (S.) James Julian Weinstein, 1 Court Street, Boston 8, Massachusetts.

Of Counsel:

David G. Macdonald, Warren Price, Jr., MacLeay, Lynch & Macdonald, William H. Armbrecht, Jr.

[File endorsement omitted.]

[fol. 26] United States District Court, District of Massachusetts

[Title omitted]

Order Allowing Intervention of Pan-Atlantic Steamship Corporation—April 16, 1956

This cause coming on to be heard on the motion of Pan-Atlantic Steamship Corporation for leave to intervene as a party defendant, and the court having considered said motion and the answer to the complaint tendered therewith and it appearing to the court that the said Pan-Atlantic Steamship Corporation should be permitted to intervene as prayed, and the court being duly advised in the premises,

It Is Ordered, that Pan-Atlantic Steamship Corporation has leave to intervene in this cause, and is hereby made a party defendant to this cause; and the Motion to Strike and the Answer of said defendant, as attached to said Motion for leave to intervene, are hereby received.

Entered this 16 day of April 1956.

(S.) Wyzanski.

[File endorsement omitted.]

[fol. 27] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE PLAINTIFFS' FIRST AMENDED COMPLAINT—Filed May 7, 1956

The Interstate Commerce Commission, hereinafter called the Commission, intervening defendant in the above-entitled action, for answer to the plaintiffs' first amended complaint therein filed:

1

Admits the allegations of paragraphs 1 to 10, inclusive.

2

Admits, as to paragraph 11, the filing with the Commission of a document of the purport of Exhibit 13; but neither [fol. 28] admits nor denies the statements contained in this exhibit, or their relevancy to this proceeding, for the reason that the Commission, in the performance of its statutory duty to administer and enforce the Interstate Commerce Act, is now in the process of conducting inquiries into many of the matters therein alleged for the purpose of determining the truth or falsity of such allegations, whether the acts there alleged, if they occurred, constitute violations of the Interstate Commerce Act, and the action to be taken with respect thereto. These proceedings are entitled: Docket No. MC-F-5913, *Malcolm P. McLean—Control—Pan Atlantic Steamship Corporation and McLean Trucking Company;* Docket No. MC-F-5917, *Atlantic Coast Line Railroad et al.* v. *McLean Trucking Company et al.;* and Docket No. MC-F-5976, *Investigation of Common Control of McLean Trucking Company, Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation.* Hearings have been held with respect thereto but no final decisions have been made by the Commission.

3

Admits the allegations in paragraphs 12 to 15, inclusive.

4

Denies the allegations of paragraph 16 insofar as the temporary authority involved in this proceeding is concerned.

5

Admits the allegations of paragraph 17.

6

In answer to the allegations of paragraph 18, admits that the operations of Pan-Atlantic, to some extent, are competitive with those of the plaintiffs, but neither admits [fol. 29] nor denies the other allegations for lack of knowledge or information.

7

Denies the allegations of paragraph 19 that plaintiffs have or will suffer any legal damages as the result of the matters involved in this action, but neither admits nor denies the conclusions of law asserted therein.

8

Admits the allegations of paragraph 20, subject to the possibility that the temporary authority may be terminated at an earlier date.

9

Neither admits nor denies the allegations in paragraph 21, for the reason that it has no knowledge of the amount of testimony that may be offered or the number of witnesses who may be called at the further hearings to be held in the Pan-Atlantic certificate application proceeding.

10

Denies the allegations of paragraph 22 that plaintiffs will suffer immediate and irreparable damage through the competition of Pan-Atlantic; neither admits nor denies the allegations of said paragraph concerning the time that

may be required for the conclusion of the Commission proceeding on the application of Pan-Atlantic for the reason that, while the proceeding will be processed with all possible despatch, it cannot be predicted when a final order will be entered; neither admits nor denies the allegations of said paragraph respecting the continuance of the tempo-
[fol. 30] rary authority pending review in the courts of the final order that may be entered by the Commission, for the reason that if judicial review is sought, the circumstances that will exist at that time cannot be anticipated.

11

For a further defense, the defendant Interstate Commerce Commission states that the sole issue in this proceeding is whether the temporary authority of the Pan-Atlantic Steamship Corporation, issued under authority of section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(e)) by order of the Commission dated May 18, 1955, for a period of 180 days to expire with November 14, 1955 (Plaintiffs Exhibit 12), was lawfully extended by the order of the Commission dated October 28, 1955 (Plaintiffs' Exhibit 17) and section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008) until the final determination of an application for a certificate of public convenience and necessity to continue the same operations authorized by the temporary authority, which application was filed with the Commission by the Pan-Atlantic Steamship Corporation on or about May 5, 1955 (Paragraph 6 of the first amended complaint), and not yet decided by the Commission. (See paragraphs 15 and 16 of the allegations and paragraphs B and C of the prayer in Plaintiffs' complaint). This defendant denies that the said order is invalid for the reasons assigned in Plaintiffs' complaint or for any reason whatever.

[fol. 31] Wherefore, having answered the first amended complaint, the defendant Interstate Commerce Commission prays that the relief sought therein be denied, that the complaint be dismissed, and that the Court enter such other or further orders or decrees as may be just and proper.

Respectfully submitted, (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associ-

ate General Counsel, Attorneys for the Defendant Interstate Commerce Commission, Washington 25, D. C.

[fol. 32] CERTIFICATE OF SERVICE (omitted in Printing)

[fol. 33] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

FIRST AMENDED ANSWER OF INTERVENING DEFENDANT, PAN-ATLANTIC STEAMSHIP CORPORATION—Filed May 9, 1956

1. The allegations set forth in Paragraph 1 of the first amended complaint respecting jurisdiction of this court are admitted.

2. The allegations set forth in Paragraph 2 of the first amended complaint are admitted.

3. The allegation set forth in Paragraph 3 of the first amended complaint with respect to the geographic operations of the plaintiffs is admitted, but the allegation as to the importance and significance of such operations is neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

4. The allegation as to the place of business of the plaintiff, New York, New Haven, and Hartford Railroad Company is admitted. The allegation as to the place of organization and residence of said plaintiff is neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

5. The allegations of Paragraph 5 of the first amended complaint are admitted, but by way of further answer intervening defendant states that said allegations are incomplete and that the operating authority of Pan-Atlantic [fol. 34] is as set forth in its permanent and temporary operating authorities as issued by the Interstate Commerce Commission.

6. The allegations set forth in Paragraph 6 of the first amended complaint are admitted.

7. The allegations set forth in Paragraph 7 of the first amended complaint are admitted.

8. The allegations set forth in Paragraph 8 of the first amended complaint are admitted.

9. The allegations set forth in Paragraph 9 of the first amended complaint are admitted.

10. The allegations set forth in Paragraph 10 of the first amended complaint are admitted.

11. The allegation in Paragraph 11 of the first amended complaint, that Exhibit 13 is the matter referred to in Paragraph 2 of Exhibit 16 is admitted; and by way of further answer intervening defendant states that, pursuant to the agreement reached on the record in the pre-hearing conference in this case, only the filing of said documents by plaintiffs is admitted, but the truthfulness or relevancy thereof is not admitted.

12. The allegations set forth in Paragraph 12 of the first amended complaint are admitted.

13. The allegations set forth in Paragraph 13 of the first amended complaint are admitted.

14. The allegations set forth in Paragraph 14 of the first amended complaint are admitted.

15. The allegations set forth in Paragraph 15 of the first amended complaint are admitted.

16. The allegations set forth in Paragraph 16 of the first amended complaint are denied insofar as the temporary authority granted in this proceeding is concerned.

17. The allegations set forth in Paragraph 17 of the first amended complaint are neither admitted nor denied, because intervening defendant is without knowledge with respect thereto.

[fol. 35] 18. The allegations set forth in Paragraph 18 of the first amended complaint as to loss of business and good will suffered by the plaintiffs in the past by operations of Pan-Atlantic are denied. Further allegations of said paragraph are neither admitted nor denied for the reason that they are merely speculative and argumentative.

19. The allegation set forth in Paragraph 19 of the first amended complaint as to losses sustained by plaintiffs in the past is denied, and the other allegations in said para-

graph are neither admitted nor denied for the reason that they are speculative and argumentative.

20. The allegations set forth in Paragraph 20 of the first amended complaint on information and belief are admitted, (the reference therein to 11(b) being interpreted as 6).

21. The allegations set forth in Paragraph 21 of the first amended complaint are neither admitted nor denied for the reason that Pan-Atlantic, the applicant in said proceeding for permanent authority, has completed its case and has no knowledge upon which to base an opinion with respect to the case to be presented by the protestants.

22. The allegation set forth in Paragraph 22 of the first amended complaint with respect to immediate and irreparable damage being suffered by plaintiffs through the competition of Pan-Atlantic is denied, and defendant neither admits nor denies the other allegations of said paragraph on the ground that such an answer would be merely speculative.

23. The allegations set forth in Paragraph 23 of the first amended complaint are admitted.

24. For further defense, intervening defendant states that this action involves an attack upon the validity of an order of the Interstate Commerce Commission dated October 28, 1955, in Docket No. W-376 (Sub-No. 11) and Docket No. W-376 (Sub-No. 12), *Pan-Atlantic Steamship Corporation—Temporary Authority*—Inter-coastal Trade, and intervening defendant further states that said order was made and issued within the Commission's statutory authority, Section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)), and Section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008). Intervening defendant [fol. 36] denies that said order is invalid for the reasons assigned in plaintiff's complaint or any reason whatever.

Wherefore, having fully answered the first amended complaint, intervening defendant prays that the relief sought therein be denied and the complaint be dismissed, and the court enter other or further orders, decrees or relief that may be just and proper.

Pan-Atlantic Steamship Corporation by its attorneys, (S.) Russell S. Bernhard, David G. Macdon-

ald, 1625 K Street, N. W., Washington 6, D. C., James Julian Weinstein, 1 Court Street, Boston 8, Massachusetts.

Of Counsel:

Macleay, Lynch & Macdonald, William H. Armbrecht, Jr., Warren Price, Jr.

Certificate of Service (omitted in Printing)

[fol. 37] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Plaintiffs' Motion for Summary Judgment—Filed May 3, 1956

The plaintiffs move for summary judgment in their favor by the granting of all of the relief requested in their complaint. This motion is made more than 20 days after commencement of the above-described action, and is made upon the complaint.

Plaintiffs assert as the ground for the granting of summary judgment the absence of any genuine issue as to the following material facts:

1. The Interstate Commerce Commission by order has issued to Pan-Atlantic Steamship Corporation authority to engage in intercoastal common carriage for 180 days.

2. The Interstate Commerce Commission has by order extended such authorization for an aggregate of more than 180 days.

3. Pan-Atlantic Steamship Corporation has provided intercoastal carrier services for more than an aggregate of 180 days pursuant to the orders aforesaid.

4. The aforesaid state of affairs will continue during the [fols. 38-39] pendency of a proceeding before the Inter-

state Commerce Commission arising out of an application by Pan-Atlantic for a permanent certificate of public convenience and necessity authorizing intercoastal carrier operations including those above referred to.

5. The temporary authority aforesaid issued to Pan Atlantic before Pan Atlantic became an applicant for the permanent certificate above referred to.

Respectfully submitted, W. Q. Keenan, 54 Meadow Street, New Haven, Connecticut, E. M. Sweeney, South Station, Boston, Massachusetts, Attorneys for Plaintiffs.

Of Counsel:

Charles T. Abeles, James A. Bistline, Anthony P. Donadio, U. B. Ellis, Carl Helmetag, Jr., Prime F. Osborn, III.

Certificate of Service (omitted in Printing)

[fol. 40] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Motion of Intervening Defendant, Pan-Atlantic Steamship Corporation for Summary Judgment—Filed May 9, 1956

Intervening defendant, Pan-Atlantic Steamship Corporation, moves for summary judgment in its favor by the granting of all of the relief requested in its first amended answer. This motion is made more than 20 days after commencement of the above-described action, and is made upon the pleadings and pursuant to the agreement of the parties in the record of the pre-hearing conference in this proceeding.

Intervening defendant asserts as the ground for the

granting of summary judgment the absence of any genuine issue as to the following material facts:

1. Pan-Atlantic Steamship Corporation applied to the Interstate Commerce Commission for a permanent certificate of public convenience and necessity to perform intercoastal common carrier water service on May 5, 1955, which application is presently pending before said Commission.

2. The said Commission on May 18, 1955, granted to Pan-Atlantic authority to perform for a period of one hundred eighty days a portion of the service included within the aforesaid application for permanent authority.

3. The said Commission on October 28, 1955, pursuant to an application of Pan-Atlantic under applicable rules of the Commission, issued an order finding that there is a [fol. 41.] public need for the continuance of the water carrier service being performed by Pan-Atlantic under its one hundred eighty day authority, that such service is an activity of a continuing nature, and that such service corresponds in part to the pending application for permanent authority, and authorizing Pan-Atlantic to continue such service beyond the expiration of said one hundred eighty day period and until the final determination of said application for permanent authority.

4. The attaining of a final determination of said application for permanent authority within a period of one hundred eighty days after the filing thereof was beyond the control of the applicant, Pan-Atlantic.

Respectfully submitted, (S.) Russell S. Bernhard, David G. Macdonald, 1625 K Street, N. W., Washington 6, D. C., James Julian Weinstein, 1 Court Street, Boston, Massachusetts, Attorneys for Pan-Atlantic Steamship Corporation.

Of Counsel:

Macleay, Lynch & Macdonald, William H. Armbrecht, Jr., Warren Price, Jr.

Certificate of Service (omitted in Printing)

[fol. 42] IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

ATLANTIC COAST LINE RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, and SOUTHERN RAILWAY COMPANY, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, and PAN-ATLANTIC STEAMSHIP CORPORATION, Intervening Defendants

OPINION— May 17, 1956

Before Magruder, Circuit Judge, and Ford and Wyzanski, District Judges.

[File endorsement omitted.]

[fol. 43] Per Curiam. The amended complaint herein seeks a decree from us setting aside an order of the Interstate Commerce Commission.

On or about May 5, 1955, Pan-Atlantic Steamship Corporation made application to the Commission for permanent authority to operate as a common carrier by water between certain Atlantic and Pacific ports.

While this application was pending, upon application by Pan Atlantic Steamship Corp. for temporary authority under § 311(a) of the Interstate Commerce Act, as amended (49 U. S. C. § 911(a)), the Commission issued its order on May 18, 1955, granting authority to Pan-Atlantic Steamship Corp. to operate as a common carrier by water between certain named Atlantic and Pacific ports, up to and including November 14, 1955.

Subsequently, by order entered October 28, 1955, the Commission authorized Pan-Atlantic Steamship Corp. to

continue to perform such temporary water carrier service, until further order of the Commission, but not beyond the time the pending application for permanent authority should have been determined. This order of October 28, 1955, is the one complainants seek to have us annul, on the ground that it constitutes an *ex parte* extension of temporary authority beyond the maximum period of 180 days prescribed in § 311(a). The Commission, on the other hand, claims that its more extended order is sanctioned by § 9(b) of the Administrative Procedure Act (60 Stat. 242).

This case is ruled in principle by the decision of this court in *Stone's Express, Inc. v. United States*, 122 F. Supp. 955 (1954). (Our judgment was subsequently vacated for [fol. 44] mootness pursuant to stipulation of the parties, *Interstate Commerce Commission v. Stone's Express, Inc.*, 350 U. S. 906 (1955).) Though that case involved the 180-day limitation in § 210a(b) of the Interstate Commerce Act (49 U. S. C. § 310a(b)), the issue as to the Commission's power is essentially the same. We think, consistent with the usual deference to precedent common in this Court, we should adhere to the conclusion reached in *Stone's Express, Inc. v. United States*, supra.

The plaintiffs' motion for summary judgment is granted, and a permanent injunction will be entered requiring the Commission to set aside and annul its order of October 28, 1955, in so far as that order continues the temporary operation previously authorized by the Commission.

WYZANSKI, *District Judge*. I concur exclusively on the ground that I always defer to an earlier decision by my brethren, except where the decision is remote in time, or except where the court seems to me to have been inescapably wrong. Neither of these conditions is present here. However, in order to make clear the desirability of a Supreme Court review of the problem, I add that were the matter *res integra*, and were I not, as I conceive, bound by the ruling in *Stone's Express, Inc. v. United States*, D. Mass., 122 F. Supp. 995 (1954), I should conclude that, by virtue of § 9(b) of the Administrative Procedure Act, 60 Stat. 242, the I. C. C. did not act *ultra vires* in entering its order of October 28, 1955. I am authorized to state that Judge Ford agrees with this view.

[fol. 45] In United States District Court, District of Massachusetts

Civil Action No. 56-232-W

Atlantic Coast Line Railroad Company, The Baltimore and Ohio Railroad Company, Louisville and Nashville Railroad Company, The Pennsylvania Railroad Company, Seaboard Air Line Railroad Company, Southern Railway System and The New York, New Haven and Hartford Railroad Company, Plaintiffs,

vs.

The United States of America, Defendant,

and

The Interstate Commerce Commission and Pan-Atlantic Steamship Corporation, Intervening Defendants

Judgment—May 25, 1956

This cause came on to be heard on the plaintiffs' motion for leave to amend their complaint and on the motions of the plaintiffs and of Pan-Atlantic Steamship Corporation, intervening defendant, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the verified first amended complaint and the answers thereto filed by Pan-Atlantic Steamship Corporation and the Interstate Commerce Commission, intervening defendants, and the answer of the United States filed responsively to the complaint, having found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the Trial Court; and having concluded that plaintiffs are entitled to judgment as a matter of law,

It is hereby Ordered, Adjudged and Decreed:

(1) That the plaintiffs' motion for leave to file their first amended complaint is granted;

[fol. 46] (2) That the plaintiffs' motion for summary judgment is granted and Pan-Atlantic Steamship Corporation's motion for summary judgment is denied.

(3) That the order of the Interstate Commerce Commission dated October 28, 1955, entered in I. C. C. Docket

No. W-376 (Sub-Nos. 11 and 12) extending Pan-Atlantic Steamship Corporation's authority to engage in inter-coastal operations beyond a period of 180 days shall be, and it is hereby vacated, annulled and set aside.

Issued at Boston, Massachusetts, this 25th day of May, 1956.

(S.) Calvert Magruder, Judge of the United States Court of Appeals, (S.) Francis J. W. Ford, United States District Court Judge, (S.) Charles E. Wyzanski, Jr., United States District Court Judge.

[fol. 47] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

PETITION OF THE INTERSTATE COMMERCE COMMISSION FOR STAY OF JUDGMENT—Filed May 28, 1956

The Interstate Commerce Commission respectfully petitions this Court to stay, pursuant to Rule 62(c) and (e) of the Federal Rules of Civil Procedure, its judgment in the above-entitled case pending an appeal to the Supreme Court of the United States and the final disposition of that appeal, for the following reasons:

1. We are authorized by counsel for plaintiffs to say that the plaintiffs do not oppose the entry of an order staying the judgment in this case pending appeal to and final disposition of the appeal by the Supreme Court of the United States. We are further authorized to say that [fol. 48] this position is taken by the plaintiffs solely because a similar stay of judgment was allowed by this Court in the precedent case, *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955.

2. By order dated May 18, 1955, the Commission issued to Pan-Atlantic Steamship Corporation, under authority of section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) temporary authority to engage in exten-

sive water carrier operations as a common carrier of general commodities between numerous ports located on both the Atlantic and Pacific coasts of the United States. This temporary authority was issued only upon the careful consideration of evidence which convinced the Commission that there was an immediate and urgent need for this common carrier service and that there existed no other carrier service capable of meeting such need. This temporary authority was extended beyond the 180 days allowed by Section 311(a) under the assumed authority and requirements of section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) upon a determination that the operation was continuing in nature and the licensee had met all other conditions of that statutory provision. This operation, obviously, involves the investment of large sums of money, the use of expensive ships and the employment of a large number of employees. If Pan-Atlantic should be compelled to discontinue this service pending appeal to and determination of the appeal by the Supreme Court, not only would it suffer severe damages, but more important from the standpoint of the administration of the Interstate Commerce Act, the public would be deprived of this needed common carrier service. On the other hand, the losses, if [fol. 49] any, that would be suffered by the plaintiffs as the result of the continued operation by Pan-Atlantic pending this appeal, or the determination of Pan-Atlantic's application for a certificate, whichever is earlier, is purely speculative. A stay of the Court's judgment is, therefore, warranted in order to maintain the status quo and to protect Pan-Atlantic, its employees, and shippers from losses which would result from the discontinuance of this operation.

3. On April 1, 1956, there were outstanding two water carrier temporary authorities issued under section 311(a) which had been extended under the assumed authority of section 9(b) of the Administrative Procedure Act. On the same date there were outstanding approximately 500 motor carrier temporary authorities issued under the very similar provisions of section 210a(a) which had been extended beyond 180 days under section 9(b) of the Administrative Procedure Act. During the year 1955, 39 water carrier temporary authorities were issued under section 311(a),

of which 3 were extended under section 9(b). During the same year, 2,767 motor carrier temporary authorities were issued under the corresponding section 210a(a), of which 508 were extended under section 9(b). It will thus be observed that this interpretation of section 9(b) of the Administrative Procedure Act which the Commission has followed since 1947 is extremely important in the administration of the Interstate Commerce Act and in the interest of the commerce of the United States which it is the purpose of that Act to serve. We submit, therefore, that this interpretation and practice which has been so long followed should not be disrupted or jeopardized by the making effective of a decree in this case prior to a review of the [fol. 50] matter by the Supreme Court.

4. The fact that this case was not decided on the merits of the particular case but solely upon the precedent established in *Stone's Express, Inc.* v. *United States, et al.*, 122 F. Supp. 955, and the fact that two of the participating Judges (including one who participated in the *Stone's* decision) indicated that their conclusions would have been different if this were a matter *res integra*, shows a difference of opinion which should be resolved by the Supreme Court. We submit that, under the circumstances, the decree should not be made effective prior to opportunity for such review by that Court.

5. In *Stone's Express, Inc., supra*, although the decision of the three-judge court was unanimous, the Court, by its judgment and decree of June 3, 1954, allowed time for appeal by requiring that the Commission "within (60) days" make and enter an order revoking the order in question. Subsequently, the Court, upon petition, by its order of June 28, 1954, stayed its decree until the final disposition by the Supreme Court of the appeal of this Commission. We submit that under the circumstances of the present case, there is even greater justification for a stay pending appeal and final disposition by the Supreme Court.

6. We further call attention to the fact that the Supreme Court noted probable jurisdiction in the appeal from the decision of the District Court in *Stone's Express, Inc.* v. *United States, supra* (348 U. S. 886), despite the pendency of a motion to affirm, thereby indicating that Court's view

that the questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, [fol. 51] for their resolution. The case was remanded to the District Court for dismissal as moot upon the suggestion of the parties: 350 U. S. 906.

In view of the above circumstances, it is respectfully submitted that a stay of the Court's decree should be granted pending an appeal to and determination by the Supreme Court. A draft of a Proposed Order is attached.

Interstate Commerce Commission, (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel, Washington 25, D. C.

Certificate of Service (omitted in Printing)

[fol. 52] In United States District Court, District of Massachusetts

[Title omitted]

Order Granting Stay of Judgment Pending Appeal to and Final Disposition of Appeal by the Supreme Court

The Court having considered the petition filed by the defendant Interstate Commerce Commission and the statement in support thereof filed by Pan-Atlantic Steamship Corporation for a stay of the Court's judgment and order entered on May 25, 1956, pending an appeal to and the disposition of the appeal by the Supreme Court of the United States,

And it appearing to the Court, that the granting of the said petition is not opposed by plaintiffs; and the Court [fol. 53] being fully advised in the premises:

It is ordered, adjudged and decreed, That the said judgment and order of this Court entered on May 25, 1956, in the above-entitled case, be, and it is hereby, stayed for a period of 60 days pending appeal by the Interstate Commerce Commission to the Supreme Court of the United

States and, in the event of such appeal, the judgment and order is hereby further stayed pending the final disposition of such appeal by the Supreme Court.

(S.) Calvert Magruder, Circuit Judge, (S.) Francis J. W. Ford, District Judge, (S.) Charles E. Wyzanski, Jr., District Judge.

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS

[Title omitted]

NOTICE OF APPEAL BY THE INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed July 17, 1956

I

Notice is hereby given that the Interstate Commerce Commission, an intervening defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in the action on May 25, 1956.

This appeal is taken pursuant to 28 U. S. C. 1253.

II

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

[fol. 55] (a) Order of March 19, 1956 by United States Circuit Judge Calvert Magruder appointing himself, and United States District Judges J. W. Ford and Charles E. Wyzanski, Jr., to hear this case;

(b) Plaintiffs' first amended complaint;

(c) Exhibits attached to the original complaint and referred to in the plaintiffs' first amended complaint, as follows: Nos. 12, 15, 16, 17, 18 and 19;

(d) Motion of the Interstate Commerce Commission for leave to intervene;

(e) Motion of the Pan-Atlantic Steamship Corporation for leave to intervene;

(f) Orders of the Court granting motions for leave to intervene;

(g) Answer of the Interstate Commerce Commission to plaintiffs' first amended complaint;

(h) First amended answer of Pan-Atlantic Steamship Corporation to plaintiffs' first amended complaint;

(i) Plaintiffs' motion for summary judgment;

(j) Motion of Pan Atlantic Steamship Corporation for summary judgment;

(k) Opinion of the Court, including separate statement of Judge Wyzanski;

(l) Judgment of the Court, entered May 25, 1956;

(m) Petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation in support of petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(o) Order of May 29, 1956, by the Court, staying its judgment and order of May 25, 1956, pending appeal;

(p) This notice of appeal.

[fol. 56] III

The following question is presented by this appeal:

Whether section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had

not been finally determined by the Commission upon the expiration of the 180 days of operation allowed by the temporary authority.

Robert W. Ginnane, General Counsel, James A. Murray, Associate General Counsel, Attorneys for the defendant Interstate Commerce Commission. Washington 25, D. C.

[fol. 57] Proof of Service (omitted in Printing)

[fol. 58] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Notice of Appeal by the Pan-Atlantic Steamship Corporation to the Supreme Court of the United States—Filed July 25, 1956

I

Notice is hereby given that Pan-Atlantic Steamship Corporation, an intervening defendant in the above-entitled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on May 25, 1956.

This appeal is taken pursuant to 28 U. S. C. 1253 and 2101(b).

II

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in the said transcript the following:

(a) First amended complaint, dated April 30, 1956, filed by Atlantic Coast Line Railroad Company, et al, plaintiffs, including the following exhibits adopted by reference in the first amended complaint and appearing as exhibits

attached to the original complaint filed by said plaintiffs, dated March 9, 1956; numbers 12; 15, 16; 17; 18; and 19;

[fol. 59] (b) Motion of Interstate Commerce Commission for leave to intervene as defendant;

(c) Motion of Pan-Atlantic Steamship Corporation for leave to intervene as defendant;

(d) Order of Court granting motions to intervene;

(e) Answer of Interstate Commerce Commission, Intervening Defendant, to amended complaint;

(f) First Amended Answer of Intervening Defendant, Pan-Atlantic Steamship Corporation, to amended complaint;

(g) Motion of Plaintiffs for summary judgment;

(h) Motion of Pan-Atlantic Steamship Corporation, Intervening Defendant, for summary judgment;

(k) Opinion of Court, dated May 17, 1956;

(l) Judgment of Court, dated May 25, 1956;

(m) Petition of Interstate Commerce Commission, Intervening Defendant, for Stay of Judgment, pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation, Intervening Defendant, in support of petition of Interstate Commerce Commission for stay;

(o) Order of Court dated May 29, 1956, staying judgment;

(p) This notice of appeal;

III

The following questions are presented by this Appeal:

First Question: Whether section 9(b) of the Administrative Procedure Act (5 U. S. C. 1008(b)) extended or authorized or required the Commission to extend beyond 180 days, a temporary authority issued to Pan-Atlantic Steamship Corporation under section 311(a) of the Interstate Commerce Act (49 U. S. C. 911(a)) authorizing operation as a common carrier by water, where the common carrier operation was of a continuing nature and Pan-Atlantic had filed a timely and sufficient application for a certificate of public convenience and necessity to continue the same operations conducted under the temporary authority, which application had not been finally determined by

the Commission upon expiration of the 180 days of operation allowed by the temporary authority.

[fol. 60] *Second Question:* Whether the District Court was in error in this case by following its decision in *Stone's Express Inc.*, v. *Interstate Commerce Commission*, 122 F. Supp. 955, under the doctrine of *stare decisis*, in view of the fact that the Supreme Court of the United States noted probable jurisdiction in the *Stone's Express Case*, 348 U. S. 885, 99 L. Ed. 696, and subsequently vacated said judgment and remanded the case to the District Court for dismissal of the proceedings in accordance with the stipulation of the parties as to mootness, 350 U. S. 906, 100 L. Ed. (adv. p. 125), and when two of the three judges in this case stated in their concurring opinion that where the matter *res integra* they would have entered judgment for the defendants in this case?

Russell S. Bernhard, David G. Macdonald, James J. Weinstein, Attorneys for Pan-Atlantic Steamship Corporation, Intervening Defendant.

[fol. 60] Proof of Service (omitted in Printing)

[fol. 61] [File endorsement omitted]

In United States District Court, District of Massachusetts

[Title omitted]

Amendment to Designation or Record to Be Certified
Filed August 6, 1956

Pan Atlantic Steamship Corporation herewith amends its requests to the Clerk to prepare a transcript of record in this cause for transmission to the Clerk of the Supreme Court of the United States (a) by striking and excluding therefrom Items (m) and (n) which were set forth therein as follows:

"(m) Petition of Interstate Commerce Commission, Intervening Defendant, for Stay of Judgment, pending appeal;

"(n) Statement of Pan-Atlantic Steamship Corporation,

Intervening Defendant, in support of petition of Interstate Commerce Commission for stay;" and (b) by adding this amended designation, together with Proof of Service thereof.

(S.) David G. Macdonald, Russell S. Bernhard, James J. Weinstein, Attorney for Pan-Atlantic Steamship Corporation, Intervening Defendant.

Washington, D. C. August 2, 1956.

[fol. 62] Proof of Service (omitted in Printing)

[fol. 63] In United States District Court, District of Massachusetts

[Title omitted]

Amendment to Notice of Appeal by the Interstate Commerce Commission to the Supreme Court of the United States—Filed August 8, 1956

The Interstate Commerce Commission hereby amends its request to the Clerk to prepare a transcript of the record in the above entitled cause for transmission to the Clerk of the Supreme Court of the United States, (a) by striking and excluding therefrom items (m) and (n), which were set forth therein as follows:

"(m) Petition of the Interstate Commerce Commission for stay of judgment pending appeal;

(n) Statement of Pan-Atlantic Steamship Corporation in support of petition of the Interstate Commerce Commission for stay of judgment pending appeal;"

and (b) by adding this amendment, together with proof of service thereof.

Interstate Commerce Commission (S.) Robert W. Ginnane, General Counsel, (S.) James A. Murray, Associate General Counsel.

[File endorsement omitted.]

Washington 25, D. C., August 6, 1956.

[fol. 64] Proof of Service (omitted in Printing)

[fol. 65] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 66] Supreme Court of the United States, October Term, 1956

No. 408

Pan-Atlantic Steamship Corporation, Appellant,

vs.

Atlantic Coast Line Railroad Company, et al.

Appeal from the United States District Court for the District of Massachusetts.

Order Noting Probable Jurisdiction—November 19, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

[fol. 67] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 424

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, et al.

Appeal from the United States District Court for the District of Massachusetts.

ORDER NOTING PROBABLE JURISDICTION—November 19, 1956

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar and assigned for argument immediately following No. 408.